Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-422.

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN,
Individually and as Director,
Michigan Department of Natural Resources, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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It would appear that Michigan places principal reliance on *Younger v. Harris,* 39 LW 4201, 401 U.S. 37 (1971) and *Samuels v. Mackell,* 39 LW 4211, 401 U.S. 66 (1971), which hold that where criminal proceedings are pending in a State Court neither injunctive relief nor a declaratory judgment is appropriate.

Despite the fact that:

(1) this Court, in *Younger v. Harris, supra,* said "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun";

(2) Mr. Justice Stewart, with whom Mr. Justice Harlan joined in a concurring opinion, stated "Finally the court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions"; and

(3) this Court, in *Samuels v. Mackell, supra,* said "We, of course, express no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun;"

the State of Michigan now advocates that *because* there are no criminal prosecutions, pending or threatened, injunctive relief and declaratory judgment procedures are not appropriate. If this be the law, then this Court will have as effectively written off the statute books the provisions for declaratory judgments as if they were summarily repealed by Congress.

Great Lakes shipping is a responsible industry fully cognizant of its obligations under law, but it is also entitled to know what that law is. Michigan suggests that the industry should submit to a voluntarily cooperative program without any legal determination as to the validity of Michigan's requirement that federally licensed vessels install holding tanks or incinerating devices. The only other alternative is to submit to criminal prosecutions, with all the public condemnation that entails, in order to obtain an adjudication of legal rights.

Must a responsible industry such as Great Lakes shipping be tarred with the brush of the criminal and stamped with the broad arrow of the convict before it can obtain a judicial determination of its rights as a citizen? We sincerely hope not.

It is noted that the Court, in its recent decisions, has been as careful to specify the issues it is not deciding as it

is to specify the issues it is deciding, yet those undecided issues seem to readily surface, and this is one such case. Two unanswered questions are squarely before the Court. (1) Under what circumstances may the federal courts act when there is no prosecution pending in state courts at the time the federal proceeding is begun, and (2) under what circumstances can a state prescribe shipboard equipment on federally licensed vessels, a question conspicuously avoided in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440?

We fully appreciate the Court's sensitivity to the legitimate interests of the states, but to quote Judge Learned Hand in *Central Hanover Bank & Trust Co. v. Commissioner of Internal Revenue* (CCA 2), 159 F.2d 167 (1947), "it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks."

Respectfully submitted,

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